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90-1114
No._____

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

EDMUND J. BODINE, JR.,

Petitioner

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION

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EDMUND J. BODINE, JR.

QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD INVOKE ITS SUPERVISORY JURISDICTION WHERE THE ELEVENTH CIRCUIT COURT OF APPEALS EXCEEDED ITS APPELLATE POWERS IN REVIEWING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR REMITTITUR BECAUSE SUCH REIVEW IS CONSTITUTIONALLY PRECLUDED BY THE PROVISIONS OF THE SEVENTH AMENDMENT TO THE U.S. CONSTITUTION WHICH STATES THAT "NO FACT TRIED BY A JURY, SHALL BE OTHERWISE REEXAMINED IN ANY COURT OF THE UNITED STATES, THAN ACCORDING TO THE RULES OF THE COMMON LAW"?

II.

ASSUMING ARGUENDO THAT THE SEVENTH AMENDMENT GRANTS THE COURT OF APPEALS THE POWER TO REVIEW, WHETHER THIS COURT SHOULD INVOKE ITS SUPERVISORY JURISDICTION WHERE THE ELEVENTH CIRCUIT ERRED IN ARBITRARILY REDUCING THE PLAINTIFF'S PAIN AND SUFFERING DAMAGES FROM $2,000,000.00 TO $1,000,000.00; IN THAT, THE COURT OF APPEALS SIMPLY ENTERED THE REMITTITUR WITHOUT EXPLANATION IN VIOLATION OF *GRUNENTHAL V. LONG ISLAND RAILROAD CO.*, 393 U.S. 156 (1968), RATHER THAN CORRECTLY APPLYING THE APPROPRIATE ABUSE OF DISCRETION STANDARD OF REVIEW TO THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR REMITTITUR?

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OCTOBER TERM 1990

EDMUND J. BODINE, JR.,
Petitioner

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Edmund J. Bodine, Jr., petitions for a Writ of Certiorari to review the Judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered September 26, 1990 and rendered by denial of rehearing on November 15, 1990.

OPINIONS BELOW

This opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 912 F.2d 1373, and is Appendix A of the Petition. (A.1-10). (Slip opinion as prepared by West Publishing Co.).

Appendix B, (A.11) is an order entered by the Honorable Clarence C. Newcomer, visiting District Judge, denying Kemper's Motion for Remittitur.

JURISDICTION

The opinion and Judgment sought to be reviewed were entered September 26, 1990, Appendix A, (A.1-10), and were rendered upon the denial of a timely petition for rehearing by order dated November 15, 1990. Appendix C, (A.12). This Petition for Writ of Certiorari has been filed within ninety days of the denial of rehearing. This Court's jurisdiction is invoked under Sec. 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This Petition contains the following constitutional provision: U.S. Const. amend. VII which states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

A. District Court Jurisdiction

Jurisdiction of the United States District Court, Middle District of Florida, was predicted upon diversity of citizenship. 28 U.S.C. Sec. 1332.

B. Facts and Procedural History

Respondent, Edmund J. Bodine, Jr., ("Bodine"), brought a diversity action in the United States District Court for the Middle District of Florida against Kemper predicated upon *Life Insurance Company of Georgia v. Lopez*, 443 So.2d 947 (Fla. 1983), involving the tort of negligent failure to cancel an insurance policy under circumstances where the insurer has actual knowledge that the beneficiary plans to murder the insured to collect the policy benefits.

During the trial, Dr. Daniel Sprehe, a board certified psychiatrist, testified that, as a result of the contract killing death

threat and the subsequent failure of the insurance company to cancel the policy after notification, the Plaintiff suffered a "paranoid disorder" and sustained "permanent emotional scarring". Dr. Sprehe was the only expert witness who testified as to pain and suffering damages. The Defendant presented no evidence, no expert witnesses and no witnesses in opposition of Plaintiff's pain and suffering claim.

The Jury awarded $75,000 in lost earnings, $2,000 in out-of-pocket expenses, and $2,000,000 in emotional distress "pain and suffering" damages. The Jury found that Kemper was 75% negligent and Bodine 25% negligent, and the Amended Judgment reduced the total award by 25%. Appendix D, (A.13). Kemper filed a Motion for New Trial, a Motion for Remittitur and a Motion for Judgment Notwithstanding the Verdict, which were denied by order dated May 30, 1989. Appendix B, (A.11).

On appeal, the unanimous Eleventh Circuit panel affirmed the finding of negligence by the Trial Jury holding that there was no merit in any of the Respondent Kemper's arguments as to the issue of liability. (Appendix A, (A. 2-3), adequately sets forth the underlying facts upon which the Jury found that Kemper was negligent in failing to cancel the policy.)

However, the Circuit Court did order, without explanation, a remittitur of $1,000,000 of the Trial Jury's pain and suffering award or, in the alternative, a new trial on the sole issue of damages for pain and suffering. Appendix A, (A. 9).

Kemper timely filed a Petition For Rehearing and Request for Certification of Dispositive Issues of Law to the Supreme Court of Florida. Said Petition For Rehearing and Request for Certification were denied on November 15, 1990. Appendix C & E, (A.12,14).

REASONS FOR GRANTING THE WRIT

I

THE ELEVENTH CIRCUIT COURT OF APPEALS EXCEEDED ITS APPELLATE POWERS IN REVIEWING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR REMITTITUR BECAUSE SUCH REVIEW IS CONSTITUTIONALLY PRECLUDED BY THE PROVISIONS OF THE SEVENTH AMENDMENT TO THE U.S. CONSTITUTION WHICH STATES THAT "NO FACT TRIED BY A JURY, SHALL BE OTHERWISE RE-EXAMINED IN ANY COURT OF THE UNITED STATES, THAN ACCORDING TO THE RULES OF THE COMMON LAW."

Pursuant to the Seventh Amendment to the U.S. Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. VII.

While the U.S. Supreme Court has previously granted certiorari to consider the issue of remittitur, the Supreme Court has never expressly held that the Seventh Amendment allows appellate review of a district court's denial of a motion to set aside an award as excessive. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. _____, 109 S. Ct. 2909, 2922 n. 25 (1989). The Petitioner would argue that the Seventh Amendment does not provide for appellate review of the remittitur issue because the Seventh Amendment does not allow for the courts "to take steps which ultimately might interfere with the proper role of the jury". *Browning-Ferris Industries, supra,* at 2923 n. 26.

Further, the law has long been settled that an order of additur by a federal court violates the Seventh Amendment right to a jury trial in civil cases. *Hattaway v. McMillian,* 903 F. 2d 1440,

1451 (11th Cir. 1990); *Dimick v. Schiedt*, 293 U.S. 474, 486-488 (1935).

The Petitioner would point out that there is no justifiable difference between the Seventh Amendment not allowing for an additur by a trial judge but allowing for a remittitur by a trial judge. Both increasing and decreasing a damage award interferes with the function of the jury. Since the Seventh Amendment precludes an additur by a judge in federal court, the Plaintiff is placed at an unconstitutional disadvantage in the respect that, after a judgment award has been obtained, the Defendant knows that, upon the filing of post-trial motions, the judgment award can never be increased, but can be decreased.

Further, the Petitioner is not equally protected under the law because the plaintiff cannot appeal the trial court's granting of a motion for remittitur since he (or she) is faced with either accepting the remittitur, and thereby waiving the appeal, or accepting a new trial. *Donovan v. Penn Shipping Co.*, 429 U.S. 648 (1977); *See also*, 2 Fed Proc, L Ed Sec. 3:616. While, under the present law, the defendant can appeal the denial of a motion for remittitur. Petitioner believes that the present state of the law violates the Seventh Amendment and his right to equal protection under the Constitution.

II

ASSUMING ARGUENDO THAT THE SEVENTH AMENDMENT GRANTS THE COURT OF APPEALS THE POWER TO REVIEW, THE ELEVENTH CIRCUIT ERRED IN ARBITRARILY REDUCING THE PLAINTIFF'S PAIN AND SUFFERING DAMAGES FROM $2,000,000.00 TO $1,000,000.00; IN THAT, THE COURT OF APPEALS SIMPLY ENTERED THE REMITTITUR WITHOUT EXPLANATION IN VIOLATION OF *GRUNENTHAL V. LONG ISLAND RAILROAD CO.*, 393 U.S. 156 (1968), RATHER THAN CORRECTLY APPLYING THE APPROPRIATE ABUSE OF DISCRETION STANDARD OF REVIEW TO THE TRIAL COURT'S DENIAL OF

THE DEFENDANT'S MOTION FOR REMITTITUR.

Federal law governs the decision of whether a remittitur should be granted in a diversity case. Under federal law, whether the trial court properly refused to grant remittitur or a new trial on the grounds of an excessive damage award is tested by an abuse of discretion standard. Review is limited simply to whether the district court's refusal to set aside the jury's verdict constituted a manifest abuse of its discretion. *Royal College Shop, Inc. v. Northern Insurance Co. of N.Y.*, 895 F. 2d 670, 677 (10th Cir. 1990); *See also, Edynak v. Atlantic Shipping, Inc. CIE. Chambon*, 562 F. 2d 215 (3rd Cir. 1977); *Murray v. Fairbanks Morse*, 610 F. 2d 149 (3rd Cir. 1979); *Sykes v. McDowell*, 786 F. 2d 1098 (11th Cir. 1986).

In *Edynak v. Atlantic Shipping, Inc.*, the Court stated:

> It is simply not our function to assess what would constitute fair recompense for the injuries sustained by the Plaintiff; our duty is instead to ascertain whether the trial judge, weighing all the evidence on damages, has exercised his considered judgment as to a rational verdict in a judicial manner.

Edynak, supra, at 226.

In *Edynak*, the jury awarded damages for loss of earning capacity and for pain and suffering in the approximate amount of $273,500.00. *Edynak's* surgeon stated that he was "severely traumatized from a psychological point of view." The Appellate Court went on to say that "although the award was quite high", it was not "contrary to all reason." The Court continued:

> The deference we owed *the trial judge, "who has had the opportunity to observe the witnesses and consider the evidence in the context of a living trial rather than upon a cold record,"* and "the respect due the jury's determination of such matters of fact as the weight of evidence and the quantum of damages," combined here to overcome whatever misgivings we might have regarding the size of the verdict. *Had we been the district judge, we might perhaps found the verdict*

> *excessive and granted Atlantic's motion for a new trial.* But we cannot say that the award shocks the judicial conscience, and therefore cannot hold the district court's denial of motion constituted a manifest abuse of discretion. (Emphasis added).

Edynak, supra, at 226.

Likewise, in *Murray v. Fairbanks Morse,* the jury awarded $2,000,000.00 to the Plaintiff to be adjusted by a 5% comparative negligence reduction. The appellate court found that the jury's award amounted to nearly 1.7 million dollars in award for mental suffering and for loss of enjoyment of life. The Court also noted that, even though the final adjusted award was the highest damage award ever in a Virgin Island personal injury action, *"evidence of pain and suffering is particularly ill-suited to review upon only a written record". Murray, supra,* 610 F. 2d at 153, *quoting, Edynak, supra,* 562 F. 2d at 227 n. 16. (Emphasis added).

The Court noted that the trial judge in declining to order a remittitur on the issue of damages noted that "although he personally would not have awarded as high a verdict, it is not enough that the Court, as the trier of fact, would have awarded a lesser amount of damages. Rather, the damages assessed by the jury must be so unreasonable as to offend the conscience of the Court." The Appellate Court went on to say:

> We cannot perceive an abuse of discretion merely because we would have found the damages to be considerably less than those awarded and would have set them aside had we been the district court.

In affirming the judge's denial of remittitur, the Court stated:

> Although we believe the jury's award was very high and that more severely injured plaintiffs have often received less compensation, we cannot say that the district court abused its discretion in failing to reduce the verdict as excessive.

Murray, supra, at 154.

Likewise, in the present case, the trial judge was in the best

position to review the witnesses and the evidence presented before the jury. Petitioner would again note that the only evidence presented before the jury regarding the mental anguish and suffering of Mr. Bodine, besides the testimony of Mr. Bodine himself, was the testimony of the highly regarded psychologist, Dr. Daniel Sprehe, who was called as an expert witness. Dr. Sprehe testified regarding Mr. Bodine's continuing fears due to the threats on his life which are permanent in nature and, even though the Defendant had had years in which to have the Plaintiff examined by another medical expert, it failed to do so. Consequently, the evidence regarding Mr. Bodine's mental condition and suffering was uncontroverted and, as the 3rd Circuit has stated, evidence of pain and suffering damages is ill-suited for review upon only a written record.

In considering this Petition, the Petitioner would like to note the similarities of this case with the case of *Grunenthal v. Long Island Railroad Co.*, 393 U.S. 156 (1968). In *Grunenthal,* the Supreme Court was confronted with a similar situation where the Plaintiff had been awarded a damage amount of $305,000.00, including $150,000.00 in pain and suffering for a crushed foot. While the trial judge in denying the remittitur conceded "that the aggregate award seemed generous", the Supreme Court noted that the judge "emphasized that the trial record here has many unusual features, *the most outstanding one being the non-controversial nature of the defense has to damages.* The jury, *impressed by the uncontroverted proof adduced by plaintiff,* may well have adopted *in toto* its full significance and drawn such normal and natural inferences therefrom as the law endorses." *Grunenthal, supra,* at 158, 159. (Emphasis added).

In that case, the 2d Cir. Court of Appeals reduced the award to $200,000.00 and the U.S. Supreme Court in reversing stated that the Court of Appeals in applying the abuse of discretion standard of review is to make a detailed appraisal of the evidence bearing on the damages. The Court stated:

> If the Court of Appeals made a(n)...appraisal of the evidence in this case, the details are not disclosed in the majority opinion... *(T)he relevant discussion is*

> *limited to the bald statement that "giving Grunenthal the benefit of every doubt, and weighing the evidence precisely in the same manner as we did in Dagnello (Dagnello v. Long Island R. Co., 289 F. 2d 797 (2d Cir. 1961)... we cannot in any rational manner consistent with the evidence arrive at a sum in excess of $200,000.00".* We have therefore made our own independent appraisal of the evidence. We conclude that the trial judge did not abuse his discretion...

Grunenthal, supra, at 159, 160. (Emphasis added).

Similarly, in the Eleventh Circuit's opinion in *Bodine v. Federal Kemper Life Assurance Co.,* 912 F.2d 1373 (11th Cir. 1990), the Court made the bald statement:

> We have carefully reviewed the record in this regard... (W)e conclude that the maximum damages for pain and suffering which the jury could have found on the evidence in this case was $1,000,000.00.

Bodine, supra, at 1378, 1379. Appendix A, (A. 9).

In making this conclusory finding, there was no discussion regarding the trial court's denial of the motion for remittitur. Further, while the 11th Circuit stated that it applied the "principles" adopted in *Gorsalitz v. Olin Mathieson Chemical Corp.,* 429 F. 2d 1033 (5th Cir. 1970) (which mentioned abuse of discretion), there was no discussion as to the appropriate abuse of discretion standard of review, and most importantly, pursuant to the Supreme Court's decision in *Grunenthal,* there was no detailed appraisal of the evidence which warranted the Court of Appeals overturning the trial court's order and granting a remittitur of $1,000,000.00, especially since the evidence regarding the Plaintiff's pain and suffering was uncontroverted.[1]

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1 The Plaintiff surmises that the 11th Cir. may have considered the fact that the jury only awarded $77,000.00 in actual damages ($75,000.00 for lost wages and $2,000.00 for expenses) in reducing the pain and suffering award from $2,000,000.00 to $1,000,000.00. However, the Petitioner would note that the Supreme Court has previously found that a trial court's denial of a motion for remittitur was not an abuse of discretion where the jury awarded $6,000,000.00 in punitive damages after only awarded $51,000.00 in actual damages. *Browning-Ferris Industries, supra,* 109 S.Ct. at 2923 (1989).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

Edmund J. BODINE, Jr.,
Plaintiff-Appellee,

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Defendant-Appellant.

No. 89-3481.

United States Court of Appeals,
Eleventh Circuit.

Sept. 26, 1990.

Insured sued his insurer for insurer's alleged negligence in failing to cancel a key man life insurance policy despite its knowledge that a beneficiary was attempting to murder insured to collect the policy benefits. The United States District Court for the Middle District of Florida, No. 851814-Civ-T-17, Clarence C. Newcomer, Visiting Judge, entered judgment on a jury verdict for insured, and insurer appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) damages for pain and suffering or emotional distress were not precluded by a pretrial ruling; (2) under Florida law, the significant discernible physical injuries rule was applicable to the emotional distress injuries; and (3) the maximum damages for pain and suffering which the jury could have found was $1,000,000.

Affirmed in part, vacated in part, and remanded with instructions.

1. Federal Civil Procedure 1940

Pretrial order dismissing insured's claim against insurer for negligent infliction of emotional distress did not preclude damages for pain and suffering or emotional distress under insured's *Lopez* claim, in which insured sought damages for insurer's negligent failure to cancel insurance policy despite insurer's knowledge that beneficiary was attempting to murder insured to collect policy benefits.

2. Damages 50

As general rule, Florida law precludes recovery for emotional

distress injuries caused by defendant's negligence in absence of physical impact to claimant.

3. Damages 56.10

Under Florida law, plaintiff must show discernible physical injuries in order to recover for emotional distress under *Lopez* claim, arising from insurer's negligent failure to cancel insurance policy despite knowledge that beneficiary is attempting to murder insured to collect policy benefits.

4. Damages 56.10

Maximum amount insured could have recovered for insurer's negligent failure to cancel insurance policy despite insurer's knowledge that beneficiary was attempting to murder insured to collect policy benefits was $1,000,000.

Appeal from the United States District Court for the Middle District of Florida.

Before HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

ANDERSON, Circuit Judge.

Edmund Bodine sued Federal Kemper Life Assurance Company ("Kemper") in federal district court under that court's diversity jurisdiction. The claim upon which relief was granted is known as a *Lopez* claim. In *Life Ins. Co. of Georgia v. Lopez*, 443 So.2d 947 (Fla.1983), the Florida Supreme Court recognized the tort of negligent failure to cancel an insurance policy where the beneficiary attempts to murder the insured to collect the policy benefits and where the insurer has actual notice of the murder plot.

In this case, the FBI uncovered a plot to murder Bodine. Initially, no one was certain who was arranging Bodine's death. However, it was discovered that William Stroup, one of Bodine's partners, was behind the plot to murder Bodine so that his company, Cayman Films, Ltd., would collect on the $2,000,000 key man life insurance policy which Kemper had issued on Bodine's life. Philip Yordan, another partner whose life was also in danger, and Bodine called Kemper on November 7, 1983, and demanded that Kemper cancel the insurance policies on both of their lives. There was evidence from which the jury could have reasonably found that by early November 1983, Kemper had actual

notice of facts sufficient to trigger its duty under *Lopez*. By that time, Kemper had been notified of the murder plot against Bodine and of the fact that the insurance was a likely motive. By that time, Kemper either had received verification of this from appropriate law enforcement personnel, or could have upon appropriate investigation. Nevertheless, Kemper did virtually nothing from November 11 until December 6, 1983. On that date, Bodine's newly-hired attorney made another demand that Kemper cancel the policy on Bodine's life. On December 7, 1983, under the direct orders of Kemper's president, Kemper cancelled the policy. Bodine's attorney was notified of the cancellation; however, Bodine had gone into hiding and did not learn that the policy had been cancelled until February 28, 1984[1].

The only issue that went to trial before the jury was Bodine's *Lopez* claim. The jury found that Kemper was negligent with respect to the request to cancel the insurance policy. The jury found total damages as follows: $75,000 lost earnings; $2,000 out-of-pocket expenses; and $2,000,000 pain and suffering. The jury found that the total damages were proximately caused in the following percentages: 75% by Kemper and 25% by Bodine. Kemper appealed. We affirm in all respects except for the award of damages for pain and suffering, with respect to which we order a remittitur. Although Kemper raises numerous issues on appeal, only three warrant discussion.[2]

I. PRECLUSION OF DAMAGES FOR EMOTIONAL DISTRESS

[1] Kemper argues that damages for pain and suffering or emotional distress were precluded in this case because of a pretrial ruling on January 23, 1989, by Judge Kovachevich granting partial summary judgment in favor of Kemper. Bodine's complaint had alleged not only the *Lopez* claim, but also other claims, including a claim for negligent infliction of emotional distress. In her January 1989 opinion, Judge Kovachevich granted partial summary judgment, dismissing Bodine's claim for negligent infliction of emotional distress, because Bodine had failed to

1. Bodine gave Kemper his parents' address and requested that Kemper inform them upon cancellation of the policy; however, Kemper did not send the notification of cancellation to the requested location. Had Kemper done so, Bodine would have received the notification because Bodine contacted his parents twice daily during the relevant time frame.

2. Kemper's other claims of error have no merit and warrant no discussion.

demonstrate a genuine issue of fact either as to physical impact or significant discernible physical injury resulting from psychic trauma.[3] Kemper argues on appeal that Judge Kovachevich's ruling that there was no genuine issue of fact as to significant discernible physical injuries should apply both to Bodine's negligent infliction of emotional distress claim and also to his *Lopez* claim. Following Judge Kovachevich's January 1989 order, the case was assigned for trial to Judge Newcomer. Kemper filed a motion in limine presenting this issue to Judge Newcomer. On March 7, 1989, Judge Newcomer filed an opinion rejecting this argument, finding that Judge Kovachevich's January 1989 order granted summary judgment only on the negligent infliction of emotional distress claim, and thus did not foreclose Bodine's *Lopez* claim or his proof of damages resulting from the *Lopez* violation (i.e., psychic trauma which manifested itself in significant discernible physical injuries). On appeal, Kemper urges us to hold that the district court erred in failing to interpret the January 1989 summary judgment order as foreclosing this claim for damages under *Lopez*.

Although the district court's January 1989 order is not as clear as we might hope, we conclude that the district court did not err in its interpretation. The January 1989 order grants summary judgment on the claim for negligent infliction of emotional distress, but the same order clearly retains the *Lopez* claim. The district court's interpretation of its previous order is not unreasonable. We find further support for this conclusion in the fact that Kemper's motion for summary judgment, on which the court was ruling in its January 1989 order, did not request summary judgment on the issue of whether Bodine could recover damages for emotional distress under his *Lopez* claim. Not having done so, it is understandable that Judge Kovachevich would not grant summary judgment on that issue. Fed.R.Civ.P. 56(c). We also note that the January 1989 partial summary judgment, dismissing some but not all of the claims, was an interlocutory order, and thus was subject to revision by the district court. *United States v. Koenig*, 290 F.2d 166 (5th Cir.1961) (whether to reconsider a previous interlocutory order of a different judge is within the sound discretion of the trial judge), *aff'd sub nom. DiBella v.*

3. The distinction between the physical impact doctrine and the significant discernible physical injury rule is discussed in Part II of this opinion.

United States, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962);[4] *see also* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶56.20[1] (2d ed. 1988) (partial summary judgment is interlocutory in character and is subject to revision by the trial court).

Thus, we reject Kemper's argument that Bodine was precluded by the January 1989 order from seeking damages for emotional distress resulting from the alleged *Lopez* violation.[5]

II. IMPACT DOCTRINE VS. SIGNIFICANT DISCERNIBLE PHYSICAL INJURIES RULE

[2] Kemper also argues that Bodine's *Lopez* claim is barred in this case by Florida's physical impact doctrine. As a general rule, Florida law precludes recovery for emotional distress injuries caused by a defendant's negligence in the absence of physical impact to the claimant. *Gilliam v. Stewart,* 291 So.2d 593 (Fla.1974). In this case, Kemper argues that Bodine suffered no physical impact, either from Kemper itself or from the suspected murder plot. Thus, Kemper urges that the district court should have granted its motion for directed verdict and for judgment notwithstanding the verdict. The Supreme Court of Florida has carved out some exceptions to the physical impact doctrine. For example, in *Champion v. Gray,* 478 So.2d 17 (Fla.1985), the Supreme Court addressed the "unusual and nontraditional cause of action in allowing damages caused by psychic injury following an injury to another." *Id.* at 20. There, a drunken driver ran off the road and killed Karen Champion. Karen's mother heard the impact, came immediately to the scene, saw her daughter's body, and was so overcome with shock and grief that she collapsed and died on the spot. *Id.* at 18. The mother's estate sued the driver for damages to, and the wrongful death of, the mother. The Supreme Court rejected the application of the Florida rule requiring that a plaintiff must suffer a physical impact before recovering for emotional distress caused by the negligence of

4. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981).

5. Kemper also suggests on appeal that it was surprised and prejudiced by the district court's ruling allowing Bodine to prove damages for emotional distress. We reject that argument. As noted in the text, the most reasonable reading of the January 1989 order was that it did not preclude such damages, thus, any reliance by Kemper on that order was unreasonable. Moreover, Kemper was on ample notice before trial that Bodine was asserting such damages. Finally, Kemper never sought a continuance on this ground from the district court.

another. Instead, the court held "that a claim exists for damages flowing from a significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing the injury, is foreseeably injured." *Id.* at 20.

[3] The Florida courts have never addressed the issue of which rule applies to a *Lopez* claim, the physical impact rule or the significant discernible physical injuries rule. The district court opined that, when faced with the issue, the Florida Supreme Court would apply the significant discernible physical injuries rule. We agree with the district court's conclusion and adopt the following portion of its reasoning:

The "impact rule" is to provide a "threshold indicator" of significant injury so the courts may feel satisfied that an emotional distress-based injury has actually occurred.

The *Champion* Court determined that this "threshold indicator" is not necessary when a "discernible physical injury [is] caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, [because this] is too great a harm to require direct physical contact . . ." *Id.* at 18. The Court did note, however, that there is still the requirement that the plaintiff suffer a "causally connected clearly discernible physical impairment [which] must accompany or occur within a short time of the psychic injury." *Id.*

The Supreme Court was aware that it had created a new tort in its affirmance of the lower court *Lopez* decision. *Lopez*, 443 So.2d at 949. It is a negligence cause of action unlike all others. The insurance company, in the proper circumstances is held to have a duty to act to deter the death threat:

> Such . . . circumstances must surely impose on the insurance company a duty to eliminate any motive for effecting the insured's death if not by withdrawing the coverage . . . then at least by warning the beneficiary that no proceeds would be payable if she in fact murdered the insured. Knowledge that the insurance company was aware of the plot and would scrutinize the insured's "accidental" death would *surely serve as a deterrent* to the accomplishment of the evil purpose. *Id.* [emphasis added].

Logically, the "impact" which is likely is not caused by the tortfeasor under the new *Lopez* tort. The only impact which is possible is, as in *Lopez,* where the death threat is actually carried out or is in the process of being carried out. The impact is not created by the actions of the defendant insurance company, but rather flows indirectly from the failure to cancel the policy thus leaving reason for the murder, the insurance benefits, as a viable option for the murderers to pursue. The possible impact is one over which defendant has little direct control; it is, rather, an event almost entirely in the hands of a third party, save for defendant's duty to act to deter the event.

I conclude that the Florida Supreme Court would not find that the "impact rule" would create any principled "threshold" of injury that would separate meritorious claims from those which are not meritorious. The doctrinal trend in Florida, as evidenced by the Supreme Court's decision in *Champion,* is to a relaxation of the "impact rule" in situations where the rule creates an arbitrary bar to those who should be compensated for emotional distress-related injury. It is clear from *Lopez* that the Florida Supreme Court believes that those injured by the negligence of the insurance companies in cases such as this one should be compensated. As in the scenario in *Champion,* the Court believes that the harm is "too great to require direct physical contact." There may be no emotional distress greater than the fear that one's life is constantly in danger from an unknown assailant. Therefore I conclude that the application of the "impact rule" would create the type of unprincipled threshold which the Supreme Court sought to avoid in *Champion,* and would nearly eradicate the recovery under the cause of action it purposefully created.

R4-144 at 5-7.

This conclusion is also supported by several other considerations. The Florida Supreme Court opinion in *Lopez* placed a clear duty on an insurance company with actual notice of the policy beneficiary's murderous intentions toward the insured to investigate and eliminate the motive for the murder, either by cancelling the policy or by warning the beneficiary that no proceeds would be payable if the beneficiary murdered the insured. Although there was physical impact in *Lopez* in the sense that the threatened murder was actually attempted, nothing in the opinion suggests that there was a *sine qua non* of the cause of action. Moreover, it is obvious that in most *Lopez* situations the threatened murder will be intercepted by law enforcement action

so that no physical impact will occur; yet, nothing in the *Lopez* opinion suggests that the cause of action will exist only in those rare situations where the murder is actually attempted such that there is a physical impact on the insured.[6]

Another factor supporting our conclusion is that the strict prerequisites for a *Lopez* claim greatly reduce the risk of fraudulent claims, thus satisfying the *raison d'etre* for the impact rule. A *Lopez* claim arises only where the insurance company receives actual notice of intent on the part of a policy beneficiary to murder the insured. It is unlikely that an insured would manufacture such a claim and give the required notice to the insurance company, because the police investigation which would naturally ensue would almost surely uncover the scheme and subject the insured to severe consequences. Moreover, in the event of an actual murder scheme of the *Lopez* type, the likelihood of fraudulent claims of psychic trauma is mitigated by the fact that emotional distress is very reasonable under such circumstances. In a similar circumstance, the Florida Supreme Court has held that it is sufficient if the psychic trauma manifests itself in significant discernible physical injuries. *Champion v. Gray,* 478 So.2d 17 (Fla.1985).[7]

---

6. The *Lopez* claim is similar to the claim allowed in *Champion v. Gray, supra,* in that both are nontraditional causes of action and both involve a great likelihood that the impact rule would rarely be satisfied.

7. Kemper's reliance on *Sguros v. Biscayne Recreational Dev. Co.,* 528 So.2d 376 (Fla.App. 3 Dist.1987), *rev. denied,* 525 So.2d 880 (Fla.1988), is misplaced. There Mr. and Mrs. Sguros lived aboard a sailboat which was docked at a marina managed by the defendant. In the middle of the night the boat was boarded by intruders who started the engine, while Mr. and Mrs. Sguros were asleep below. Mr. Sguros awakened and attempted to turn off the engine below by cutting the fuel line. However, he was stricken by a heart attack and died. Suit was filed against defendant for wrongful death of Mr. Sguros, alleging negligence in failing to provide adequate security. The court held that the claim was barred because of the absence of any physical impact upon Mr. Sguros. *Sguros* is distinguishable from the instant case in several respects. First, *Sguros* involved an ordinary claim for negligent infliction of emotional distress. Unlike *Sguros,* the instant claim is a narrowly defined, non-traditional cause of action with specific prerequisites which, as discussed in the text above, provide protection against the concerns underlying the physical impact rule. We conclude that the instant case is much more similar to *Champion v. Gray, supra,* which was also a narrowly-defined, non-traditional cause of action, the definition of which provided protection against the concerns underlying the impact doctrine. The *Champion* cause of action is limited to a plaintiff with a close family relationship to the person directly impacted and injured, and is further limited by requiring that the plaintiff be directly involved (i.e., sees the accident or hears it or arrives upon the scene while the injured party is still there). 478 So.2d at 20. Like the requirements of the *Lopez* claim, those limitations protect against fraudulent claims of psychic trauma, because emotional distress is very reasonable under those circumstances.

For the foregoing reasons, we conclude that the district court appropriately held that the Florida Supreme Court would apply the significant discernible physical injuries rule[8] to a *Lopez* claim.

III. REMITTITUR WITH RESPECT TO PAIN AND SUFFERING DAMAGES

[4] Kemper argues that the verdict in the amount of $2,000,000 for pain and suffering was so excessive as to require a remittitur. Kemper argues that the insurance policy was actually cancelled on December 8, 1983, approximately one month after Kemper received notice of the murder plot, and that Bodine was aware that the policy had been cancelled by February 28, 1984.[9] Kemper also argues that much of Bodine's anxiety was necessarily caused by the murder plot itself, rather than by Kemper's alleged negligence in failing to cancel the policy.

We have carefully reviewed the record in this regard. Applying the principles established in *Glazer v. Glazer,* 278 F.Supp. 476 (E.D.La.1968), adopted as the applicable law in *Gorsalitz v. Olin Mathieson Chemical Corp.,* 429 F.2d 1033 (5th Cir. 1970), we conclude that the maximum damages for pain and suffering which the jury could have found on the evidence in this case was $1,000,000. Thus, we order a remittitur of the total damages for pain and suffering in excess of $1,000,000.[10] If, on remand, Bodine declines to accept the remittitur, then there shall be a new trial on the sole issue of total damages for pain and suffering.[11]

---

8. Kemper also asserts that there was not sufficient evidence in this case of significant discernible physical injuries to satisfy the rule. We have carefully reviewed the record, and we conclude that there is sufficient evidence to satisfy the significant discernible physical injuries rule.

9. Although Bodine's attorney apparently received a copy of the cancellation letter shortly after December 8, 1983, Bodine testified that he was in hiding and did not receive notice until February 28, 1984.

10. Of course, this figure will have to be reduced by the 25% comparative negligence which the jury found on the part of Bodine.

11. The issue of the total damages for pain and suffering is sufficiently distinct and separate from the other issues in the case to warrant a new trial on that issue alone. Thus, no new trial is to take place on the other issues, including the findings of liability and comparative negligence, and including the findings of $75,000 lost earnings and $2,000 out-of-pocket expenses.

IV. CONCLUSION

The judgment of the district court is affirmed in all respects except for the award of damages for pain and suffering, and the case is remanded to the district court with instructions to order a remittitur of the damages for pain and suffering so that the total damages for pain and suffering (as thus remitted and before reduction for comparative negligence) shall be $1,000,000. If, on remand, Bodine declines to accept the remittitur, then the district court is instructed to order a new trial on the sole issue of the total damagesd for pain and suffering.

AFFIRMED in part, VACATED in part, and REMANDED with instructions.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

EDMUND J. BODINE, JR. **CIVIL ACTION**

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY, et al.

NO. 85-1814-CIV-T-17

O R D E R

AND NOW, this 30th day of May, 1989, upon consideration of defendant's Motion for New Trial, Motion for Remittituer, and Motion for Judgment Notwithstanding the Verdict, and the response thereto, it is hereby Ordered that defendant's motions are DENIED.

AND IT IS SO ORDERED.

/s/ Clarence C. Newcomer
Clarence C. Newcomer, J.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 89-3481

EDMUND J. BODINE, JR.,

Plaintiff-Appellee,

versus

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING
(November 15, 1990)

BEFORE: HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Federal Kemper Life Assurance Company, is Denied.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

APPENDIX D

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

AMENDED JUDGMENT IN A CIVIL CASE

EDMUND J. BODINE, JR.

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY

CASE NUMBER: 85-1814-CIV-T-17

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That Judgment is Entered for the Plaintiff, Edmund J. Bodine, Jr., in the Amount of One Million Five Hundred Fifty-seven Thousand, Seven Hundred Fifty Dollars ($1,557,750.00), and Against the Defendant, Federal Kemper Life Assurance Company, as Adjusted by the Court, on the Record, on March 9, 1989.

March 16, 1989
Date

DONALD M. CINNAMOND
Clerk

/s/ Darleen Q. Dailey
(By) Deputy Clerk

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 89-3481

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 15 1990
MIGUEL J. CORTEZ
CLERK

EDMUND J. BODINE, JR.,

Plaintiff-Appellee,

versus

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

BY THE COURT:

Appellant's Request for Certification of Dispositive Issues of Law to the Supreme Court of Florida, is DENIED.

FILED
FEB 14 1991
OFFICE OF THE CLERK

(2)

No. 90-1114

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

EDMUND J. BODINE, JR.,

Petitioner,

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, FEDERAL KEMPER LIFE ASSURANCE COMPANY

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QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD INVOKE ITS DISCRETIONARY CERTIORARI JURISDICTION TO ADDRESS ISSUES WHICH WERE NOT RAISED OR PASSED UPON BELOW?

II.

WHERE THIS COURT AND ALL ELEVEN CIRCUIT COURTS HAVE RECOGNIZED THE VALIDITY OF REMITTITURS UNDER THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, IS THERE ANY VALID ISSUE PRESENTED FOR REVIEW?

III.

SHOULD THIS COURT EXERCISE ITS DISCRETIONARY CERTIORARI JURISDICTION TO REVIEW THE ATTACK UPON THE VALIDITY OF THE REMITTITUR IN THIS CASE WHERE THE FACTUAL BASIS FOR THE REMITTITUR IS CLEARLY STATED IN THE OPINION AND SUPPORTED BY THE RECORD?

PARENTS AND AFFILIATES OF KEMPER

Respondent, Federal Kemper Life Assurance Company is part of and affiliated with Kemper Group Financial Companies which includes the following companies for purposes of Supreme Court of the United States Rule 29.1:

Lumbermans Mutual Casualty Company
Kemper Corporation
Kemper Financial Companies, Incorporated
Financial Services, Inc.
Stewart-Jennings, Incorporated
Investors Brokerage Services, Inc.
Investors Fiduciary Trust Company
Kemper Investment Management Company
(Limited England)
Kemper-Murray Johnstone International, Incorporated
Kemper Sales Company
Kemper Asset Management Company
Kemper/Cymrot, Incorporated
Kemper/Cymrot Management, Incorporated
SFA Holding Company, Ltd.
Mortgage Funding Corporation
Safe Corporation
SAF Insurance Corporation of Delaware
Kemper Investors Life Insurance Company
KILICO Realty Corporation
Galaxy Offshore, Incorporated
Loewi Financial Companies, Incorporated
Blunt Ellis & Loewi Incorporated
Loewi Advisory Services, Incorporated
Loewi Management Corporation
Beta Systems, Incorporated
B.E.L. Capital Corporation
Loewi Managed Accounts Services, Incorporated
Municipal Funding, Incorporated
Peers Holdings, Incorporated
Peers & Company
PH II, Incorporated
Peers Capital Corporation
Prescott Holdings, Incorporated
Prescott, Ball & Turben, Incorporated
Greystone Mortgage Group, Incorporated
Prescott Capital Markets, Incorporated
Carnegie Administration Corporation

BJVC Emergency Management Corporation
BJVC Real Estate Corporation
Selected Financial Services, Incorporated
Prescott Travel, Incorporated
Prescott Lease Services, Incorporated
Prescott Realty Services, Incorporated
1331 Advisers, Incorporated
PMB Corporation
Carnegie Capital Management Company
Carnegie Fund Distributors, Incorporated
Batehill, Incorporated
BEHRLEASCO, Incorporated
Batehill Leasing Corporation
Bateman Eichler, Hill Richards Realty Services, Incorporated
Bateman Eichler, Hill Richards Housing Investors, Incorporated
Bateman Eichler, Hill Richards Realty Company, Incorporated
Intercapital Group
BEHR Futures Management Corporation
BEHR Technology Management Corporation
BEHR Venture Management Corporation
Bateman Eichler, Hill Richard Overseas, B.V. (Netherlands)
Bateman Eichler, Hill Richards, Inc.,
Boettcher Investment Corporation
Boettcher & Company, Incorporated
Boettcher Insurance Agency
Boettcher Insurance, Incorporated
Forecaster Company
BPL Holdings, Incorporated
Case Management, Incorporated
MWG Holdings, Incorporated
Lovett Mitchell Webb & Garrison, Incorporated
Gulf Texas Investment Corporation
Federal Street Equities, Incorporated
Federal Street Managers, Incorporated
Dove Associates, Incorporated
Gulfstream Management, Incorporated
Gulfstream Financial Associates, Incorporated
International Business Management, Incorporated
Kemper Capital Markets, Incorporated
Ose, Sample, Lynch & Company
Kemper Clearing Corporation
Investors Fiduciary Corporation
Kemper Currency, Incorporated

Kemper Real Estate, Incorporated
Kemper Service Company
American Motorists Insurance Company

American Protection Insurance Company
AMICO Realty Corporation
BBC Associates, Incorporated
KAA1 PGA Sales, Incorporated
American Underwriting Corporation
Associated Mutuals, Incorporated
Central Mortgage Company
Kemper Realty Corporation
Kemper International Corporation
Kemper Management Company, Ltd. (Bermuda)
Kemper Insurance Company Limited (Australia)
Kemper, S. A. (Belgium)
Kemper Conservation Industrielle, S.A. (Belgium)
Kemper International Insurance Company (PET) (Limited Singapore)
The Seven Continents Insurance Company Limited (Bermuda)
American Manufacturers Mutual Insurance Company
Fidelity Life Association
Florida Realty Corporation
Kemper Lloyds Insurance Company
The James S. Kemper Foundation
Kemper Corporation
Federal Kemper Insurance Company
Mound Agency, Incorporated
Mound Agency of W. Virginia, Inc.
FKLA Realty Corporation
Galaxy Offshore, Incorporated
Kemper Reinsurance Company
Kemper Reinsurance (Bermuda) Limited
Kemper Europe Reassurances, S. A. (Belgium)
Kersa Holding Company, Luxembourg
Kemper Reinsurance London, Ltd.
American Insurance Agency Pty. Ltd. (Australia Dormant)
Economy Fire & Casualty Company
Economy Preferred Insurance Company
Economy Premier Assurance Company
Premier Assurance Center, Incorporated
National Loss Control Service Corporation
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Kemperco, Incorporated (Ill. Dormant)

Kemper/Bedford Properties, Incorporated
Kaiser Development Company
Kaiser Hawaii Kai Development Company

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No. 90-1114

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

EDMUND J. BODINE, JR.,
Petitioner

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT, FEDERAL KEMPER LIFE ASSURANCE COMPANY

Respondent, Federal Kemper Life Assurance Company, respectfully presents its Brief in Opposition to the Petition For Writ of Certiorari filed by Edmund J. Bodine, Jr.[1]

STATEMENT OF THE CASE

Bodine's Statement of the Case is inaccurate in its primary contention regarding the Eleventh Circuit's basis for ordering a remittitur in this case, and otherwise requires supplementation.

In stating that Kemper did not present any expert witnesses

1/ The parties as follows will be referred to as "Kemper" and "Bodine." (A. _____) references the appendix to the Petition. (RA. _____) references the appendix to this Brief in Opposition.

with respect to psychic injury, Bodine fails to inform the Court of the procedural history of the case. On January 23, 1989, the Honorable Elizabeth A. Kovachevich, the District Judge originally assigned to the case, entered a Partial Summary Judgment in favor of Kemper. (RA. 1-9). That Order clearly and unambiguously dispensed with all liability claims and theories except the issue of *negligence* under the claim predicated upon *Life Insurance Company of Georgia v. Lopez,* 443 So.2d 947 (Fla. 1983). (RA. 1-6). The Order then addressed the various damage claims and granted summary judgment on the claim for punitive damages, intentional infliction of emotional distress, (RA. 7-9) *and* "... as to any claim for negligent infliction of emotional damages." (RA. 7-9).

The case was then assigned to the Honorable Clarence C. Newcomer, Visiting Judge, for trial. Judge Newcomer, on the first day of trial on March 5, 1989, addressing a motion in limine on Bodine's attempt to revive emotional distress damages, revisited the prior summary judgment and reinstated the claim for negligent infliction of emotional damages. The subsequent Memorandum held that emotional distress damages were recoverable under a *Lopez* claim, even in the absence of any impact. (RA. 10-15).

This revisiting of the prior Order was affirmed by the United States Court of Appeals for the Eleventh Circuit. (A. 3-4).[2]

2/ In so doing, the Eleventh Circuit, in violation of *Erie Railroad Co. v. Thompkins,* 304 U.S. 64, 82 L.Ed 1188, 58 S.Ct. 817 (1938), refused to apply Florida's unambiguous "impact doctrine" under which damages for purely psychic injury to a plaintiff placed in fear of his own life are barred absent actual impact. Rather, the Court applied the limited relaxation of the requirement of impact which is applicable only to emotional distress over death or injury to one *other than the Plaintiff. Champion v. Gray,* 478 So.2d 17 (Fla. 1985); *Sguros v. Biscayne Recreational Development Co.,* 528 So.2d 376 (Fla. 3rd DCA 1987), pet. denied 525 So.2d 880 (Fla. 1988). The Eleventh Circuit then ignored Florida's clearly defined "objectively discernible physical impairment" standard which, under the inapplicable modification applied by the Court, is an indispensable element of any action for psychic injuries based on simple negligence. *Brown v. Cadillac Motor Division,* 468 So.2d 903 (Fla. 1985). Kemper has filed its separate Petition for Writ of Certiorari, *Kemper Life Assurance Company v. Bodine,* Case No. 90-980, to review this open violation of *Erie.*

Although erroneously affirming the judgment with respect to the recovery of emotional distress damages, the Eleventh Circuit granted a remittitur of $1,000,000 of the $2,000,000 awarded by the Jury. (A. 9). In so doing, contrary to Bodine's assertion, the Eleventh Circuit explained the factual basis upon which remittitur was granted by accepting Kemper's position, supported by the record, that:

> ...the insurance policy was actually cancelled on December 8, 1983, approximately one month after Kemper received notice of the murder plot, and that Bodine was aware that the policy had been cancelled by February 28, 1984. Kemper also argues that much of Bodine's anxiety was necessarily caused by the murder plot itself, rather than by Kemper's alleged negligence in failing to cancel the policy. (Footnote Omitted). (A. 9).

The Court noted its careful review of the Record "in this regard" in ordering the remittitur. (A. 9).

As Bodine's Petition admits, pp. 2-3, Dr. Sprehe testified that Bodine's emotional stress was the result of the death threat *and* the delay in cancelling the policy. The record reveals that much of his emotional distress was the result of the separate death threat for which Kemper was not responsible. The evidence showed that after November 11, 1983, when Kemper's personnel obtained some verification from the Federal authorities that there was a death threat, less than one month expired before Kemper cancelled the policy on December 8, 1983 removing the alleged motive under *Lopez*. (A. 3). As the Eleventh Circuit's opinion notes, Bodine's Attorney, who requested the cancellation, was immediately notified of the cancellation. (A. 3, 9 n. 9).

Bodine suffered no "impact," much less *any* physical injury as the result of any negligence by Kemper. The assassin allegedly hired by William Stroup, the beneficiary, was apprehended in November 1983 and tried and convicted in February of 1984. Stroup was not apprehended until March, 1984, and was subsequently acquitted of any criminal charges.

Bodine did not consult any physician until January 27, 1987, some *four years* after the cancellation and a year after the filing of the original complaint in December, 1985. Bodine did not give Dr. Sprehe any history of *any* physical illness. Dr. Sprehe testified only that Bodine had a mixed anxiety depression, paranoid disorder, and referred to Bodine "...sweating profusely, crying and shouting" in front of him.

Even before Kemper was notified that its policy might be the motive for the murder plot, there was evidence that Bodine thought that the government's investigation was an "abscam" operation directed at his Cayman Islands business.

For the first time on cross-examination, after over-hearing a bench conference at which the District Court questioned the evidence of physical impairment, Bodine volunteered one instance of allegedly "throwing up" on November 7, 1983 when he visited Yordan and Kemper was called and was requested to cancel the policy. This event was prior to Kemper's November 11, 1983 confirmation that there was a murder plot. Bodine testified to only one other "panic reaction" which he experienced when he was read a letter of December 2, 1983 from Kemper stating that they needed the permission of the owner of the policy to cancel the policy.

Although Bodine had been cautioned by the government not to speak to anyone, he disobeyed those instructions and contacted Stroup. Later, when his parents read him the December 2, 1983 letter, the government had just told him that Stroup was the primary suspect.

Kemper's timely filed post-trial motions for a new trial and remittitur were denied by the District Court. Following affirmance and granting of the remittitur by the Eleventh Circuit, Kemper's Petition for Rehearing and separate Request for Certification of Dispositive Issues of Law to the Supreme Court of Florida were denied on November 15, 1990. (A. 12, 14).

At no time, either in the District Court or in the Eleventh Circuit, did Bodine assert any constitutional objections to the power to grant a remittitur as evidenced by the excerpts from his Brief in the Eleventh Circuit directed to the remittitur issue. (RA. 16). Neither did Bodine seek rehearing in the Eleventh Circuit to question the sufficiency of its reasons and explanation in granting the remittitur.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because:

I.

Bodine's Petition presents issues which were not presented and ruled upon either by the District Court or the Circuit Court. The Courts of Appeals are not to be utilized as mere way stops on the road to the Supreme Court. Neither should this Court exist as an appellate court for resolution of issues waived in lower courts by failure to properly and timely assert them.

II.

Although waived, Bodine's claims that remittiturs are barred by the Seventh Amendment to the United States Constitution and that the granting of a remittitur violates the equal protection of the law are simply without merit.

All eleven Circuits have affirmed the validity of the practice of granting remittiturs under the Seventh Amendment, and this Court has given tacit approval of remittiturs in numerous decisions. Furthermore, for purposes of the Seventh Amendment, prior Circuit Court decisions and decisions of this Court have recognized the existence of precedent under English common-law before the adoption of the Seventh Amendment.

The equal protection claim is a frivolous complaint about the Federal requirement that there exist a final judgment before the right to appeal can be invoked. This rule is applicable to all litigants in Federal courts.

III.

Bodine's Petition simply refuses to acknowledge the stated factual basis in the Eleventh Circuit's opinion which, along with the record, wholly supports the remittitur in this case. The Eleventh Circuit granted the remittitur under appropriate standards of review advanced by Bodine himself.

Under the prevailing law of Florida applicable in this diversity action, Bodine was not entitled to any emotional distress damages, where there was no impact and/or the stress did not cause objective discernible physical impairment. Accordingly, he is in no position to complain about the remittitur.

Bodine's attempt to attack the remittitur at best presents a factual matter which should not concern this Court.

REASONS WHY THE PETITION SHOULD BE DENIED

I.

THE ISSUES SOUGHT TO BE RAISED HAVE BEEN WAIVED BY FAILURE TO PRESENT THEM IN THE LOWER COURTS.

While Bodine presents no basis whatsoever for the exercise of this Court's discretionary review, this Court has often stated that it will not review issues which were not properly presented to the lower courts, and which were not even raised or passed upon, including constitutional claims and allegations of a denial of a "constitutional right." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. _____, 106 L.Ed 2d 219, 239, 109 S.Ct. 2909 (1989); *United States v. Ortiz*, 422 U.S. 891, 898, 45 L.Ed 2d 623, 630, 95 S.Ct. 2585 (1975). As stated in *Duignan v. United States*, 274 U.S. 195, 200, 71 L.Ed 996, 1100, 47 S.Ct. 566 (1926), involving a constitutional issue not asserted below:

> This court sits as a court of review. It is only in exceptional cases coming here from the Federal courts of questions not addressed or passed on below or reviewed.

Here, not only did Bodine fail to raise any constitutional issues below, he also failed to seek rehearing of the remittitur in order to challenge, as he does here for the first time, the sufficiency of the Eleventh Circuit's explanation of the reasons for the remittitur.

The portions of his Brief directed to the remittitur are appended hereto. (RA. 16). Not only was there an absolute failure to raise any Seventh Amendment or other constitutional objections to the granting of the remittitur, Bodine's Brief admitted that a remittitur would be available if it is clear that the Jury's verdict was not supported by the evidence, citing: *e.g., Goldstein v. Manhattan Industries,* 758 F.2d 1435 (11th Cir. 1985), cert. denied 474 U.S. 1005, 88 L.Ed 2d 457, 106 S.Ct. 525 (1985); *Evers v. Equifax, Inc.,* 650 F.2d 793 (5th Cir. 1981); *Westbrook v. General Tire and Rubber Co.,* 754 F.2d 1233 (5th Cir. 1985).

II.

THE PETITION IN THIS CASE PRESENTS NO CREDIBLE CLAIM THAT THE GRANTING OF A REMITTITUR VIOLATES THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL OR THE EQUAL PROTECTION OF THE LAW.

Despite waiver of the issue, Bodine's claim that remittiturs are barred by the Seventh Amendment to the United States Constitution is without merit. Notwithstanding this Court's statement that it has never expressly held that the Seventh Amendment allows appellate review of a District Court's denial of a motion to set aside an award that is excessive, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* 492 U.S. _____, 106 L.Ed 2d 219, 240 n. 25, 109 S.Ct. 2909, 2922 n. 25 (1989), this Court recognized in *Gruenthal v. Long Island Railroad Co.,* 393 U.S. 156, 157 n. 2, 21 L.Ed. 2d 309, 312 n. 3, 89 S.Ct. 331 (1968):

> 3. All 11 courts of appeals have held that nothing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive. *Boyle v. Bond,* 88 US App DC 178, 187

F.2d 362 (1951); *Compania Transatlantica Espanola, S.A. v. Melendez Torres,* 358 F.2d 209 (CA 1st Cir. 1966); *Dagnello v. Long Island R. Co.,* 289 F.2d 797 (CA 2d Cir. 1961); *Russell v. Monongahela R. Co.,* 262 F.2d 349, 352 (CA 3d Cir. 1958); *Virginia R. Co. v. Armentrout,* 166 F.2d 400 (CA 4th Cir. 1948); *Glazer v. Glazer,* 374 F.2d 390 (CA 5th Cir. 1967); *Gault v. Poor Sisters of St. Frances,* 375 F.2d 539, 547-548 (CA 6th Cir. 1967); *Bucher v. Krause,* 200 F.2d 576, 586-587 (CA 7th Cir. 1952); *Bankers Life & Cas. Co. v. Kirtley,* 307 F.2d 418 (CA 8th Cir. 1962); *Covey Gas & Oil Co. v. Checketts,* 187 F.2d 561 (CA 9th Cir. 1951); *Barnes v. Smith,* 305 F.2d 226, 288 (CA 10th Cir. 1962)

Furthermore, the validity of remittiturs under the Seventh Amendment has been given tacit, if not explicit, approval by decisions of this Court. This fact is rather exhaustively examined in *Dagnello v. Long Island Railroad Co.,* 289 F.2d 797, 800-805 (2nd Cir. 1961). 6A Moore's Federal Practice, 2 ed., § 58 [7], p. 59-189 n. 10, cites a selection of eight decisions where remittiturs have "...had the apparent approval of so many Supreme Court cases,..."

As further stated in *Gorsalitz v. Olin Mathieson Chemical Corporation,* 429 F.2d 1033, 1042-1043 (5th Cir. 1970), the recognition of the validity of the practice is ingrained in our judicial system:

> We agree with Professor Moore that the use of remittitur by federal district courts "has become so universal * * *, and has had the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without a judicial uprooting of precedent akin to that effected by Erie-Tompkins," 6A Moore's Federal Practice, 2nd ed., § 59.05 [3], pp. 3739, 3740 (footnotes omitted).
>
> The Supreme Court has repeatedly approved the practice. In *Northern Pacific R.R. Co. v. Herbert,* 1886, 116 U.S. 642, 646, 746, 6 S.Ct. 590, 29 L.Ed. 755, Justice Field speaking for the Court said:

> "2. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand."

That holding and the remittitur practice were fully discussed by the elder Justice Harlan in *Arkansas Valley Land & Cattle Co. v. Mann,* 1889, 130 U.S. 69, 72-76, 9 S.Ct. 458, 32 L.Ed. 854, saying in part:

> "The practice which this court approved in *Northern Pacific Railroad v. Herbert* is sustained by sound reason, and does not, in any just sense, impair the constitutional right of trial by jury. It cannot be disputed that the court is within the limits of its authority when it sets aside the verdict where the damages are palpably or outrageously excessive."

130 U.S. at 74, 9 S.Ct. at 459. (footnote omitted).

As stated by Justice Stewart in his dissent in *Gruenthal, supra* 393 U.S. at 164, 21 L.Ed. 2d at 315-316:

> The Court professes not to consider the petitioner's argument that the Seventh Amendment and "the Federal Employers' Liability Act itself "prohibit judicial review of a district judge's order refusing to set aside a verdict as excessive. Yet by the very act of proceeding to review the district judge's order in this case, the Court necessarily, and I think quite correctly, completely rejects that argument. I fully agree with the Court and with the 11 courts of appeals that "nothing in the Seventh Amendment (or in the FELA) precludes appellate review of the trial judge's denial of a motion to set aside an award as excessive." (footnote omitted).

Notwithstanding at least tacit approval by this Court, the assertion that remittiturs are barred by the Seventh Amendment's prohibition of re-examining facts tried by a jury, "...otherwise ...than according to the rules of the common law," has no factual merit. As *Gorsalitz, supra* at 1043 and *Dagnello, supra* at 804-805 cogently point out, the English common law precedent for the practice was early recognized in *Dimick v. Schiedt,* 293 U.S. 474, 486, 79 L.Ed. 603, 611, 55 S.Ct. 296 (1935), as a "controlling distinction" between the remittiturs and additurs.

The majority opinion and Justice Stone's dissent in *Dimick,* joined by Chief Justice Hughes and Justices Brandies and Cardozo, concurred in the recognition of the uniform practice in England before the adoption of the Seventh Amendment. At common law, the practice was to apply not to the trial judge, but to the court en banc acting, effectively, as an appellate tribunal. 293 U.S. at 492 n. 2, 79 L.Ed. 2d at 614 n. 2. As stated in *Dagnello,* 289 F.2d at 804-805:

> Over a hundred years later the English precedents were studied with care. The fruits of this research appear in the majority and the dissenting opinions in *Dimick v. Schiedt, supra,* and in the dissenting opinions of Judge Holmes in the two Fifth Circuit decisions in *Sunray Oil Corp. v. Allbritton,* 1951, 187 F.2d 475, 477, and 1951, 188 F.2d 751, 752. The facts are simple enough, they were known all the time by legal scholars and students of procedure. Juries were regularly used in the courts of Kings Bench, Common Pleas and Exchequer. But motions for new trials were not addressed to the judges who presided over the trials. Instead, such motions were made at Westminster and heard en banc, by four of the judges, and the trial judge in a particular case might or might not be one of the four. There was no appeal on the point from the decision of the judges en banc. The historical evidence establishes beyond shadow of doubt that excessiveness in the amount of the verdict was commonly urged as a reason for the direction of a new trial, and many new trials were ordered for that reason alone. If it is deemed necessary to find English precedent prior to 1791 for appellate review of excessiveness, we think the practice

> at Westminster just referred to furnishes such precedent, as it was not the trial judge, but a group of judges sitting en banc and exercising functions analogous to those of an appellate tribunal, who determined the question of excessiveness. Nor does it appear that they found the question one of extraordinary difficulty. (Footnote omitted).

The final paragraph of the second argument of Bodine's Petition, at p. 5, attempts to inject an argument predicated upon a perceived equal protection violation, citing: *Donovan v. Penn Shipping Co.,* 429 U.S. 648, 51 L. Ed 2d 112, 97 S.Ct. 835 (1977)[3] and 2 Fed. Proc. L. Ed. Sec. 3:616.

Notwithstanding the fact that no such issue was raised below, and that it is not presented in the "Questions Presented" by Bodine's Petition, the equal protection argument is completely without merit. This Court's *Per Curiam* decision in *Donovan* applied the now settled rule that a plaintiff who has accepted a remittitur may not appeal. This settled rule poses no equal protection problem. If the remittitur is unacceptable to the plaintiff, he or she can appeal following the conclusion of the mandatory alternative of a new trial. Such plaintiffs are in no different position than any other litigant who must undergo a new trial and secure a final judgment before appealing the interlocutory order granting the new trial. *E.g.,* 6A Moore's Federal Practice, 2 ed., ¶ 59.15 [1], p. 59-294.

In essence, Bodine's equal protection argument is nothing more than a complaint about the "rule of finality" applicable to all litigants.

III.

THE COURT OF APPEALS APPLIED THE APPROPRIATE STANDARD OF ABUSE OF DISCRETION AND FULLY AND ADEQUATELY EXPLAINED THE REASON FOR THE REMITTITUR.

3/ *Donovan* is another example of this Court's recognition of the power of Federal courts to grant remittiturs.

Bodine's Petition proceeds upon an erroneous factual premise which is advanced through the expediency of ignoring the whole of the Eleventh Circuit's opinion. (A. 9). There is no violation of *Gruenthal, supra.* The Petition carefully avoids even referencing the Eleventh Circuit's explanation of the reason why it granted the remittitur, which is fully supported by the record. (A. 9; quoted, in part, *supra,* p. 3).

As that portion of the opinion points out, the overwhelming evidence in the record, including Dr. Sprehe's testimony, established "...that much of Bodine's anxiety was necessarily caused by the murder plot itself, rather than by Kemper's delay in cancelling the policy." (A. 9). In addition to omitting reference to this stated reason, Bodine does not deny this fact.

Furthermore, it is apparent that the Eleventh Circuit applied the appropriate "abuse of discretion" standard with respect to the District Court's action in failing to grant a remittitur as referenced by its citation of *Glazer v. Glazer,* 278 F.Supp. 476 (E.D. La. 1968), and *Gorsalitz, supra.* Indeed, this was the very standard advanced by Bodine. (RA. 16). Bodine should not be heard to argue error in this Court when he has urged the very standard applied by the Circuit Court.

Bodine would have this Court overlook the fact that, at best, any negligence in failing to more promptly rescind the policy in order to remove the motive for the murder plot, as required by *Lopez,* lasted only from November 11, 1983, when Kemper first received some confirmation from the Federal authorities of a murder plot, until December 8, 1983 when the policy was rescinded. Manifestly, Kemper is responsible only for damages incurred because of its delay and not the murder plot itself.

Even considering the one instance of "throwing up" which occurred on November 7, 1987, together with the panic reaction Bodine felt when he found out from the December 2, 1983 letter that the policy had not yet been cancelled (but was cancelled on December 8), in light of the fact that he never experienced *any*

physical *impairment,*[4] and never visited a doctor until one year after the filing of the lawsuit, $1,000,000 under the remittitur is still an exorbitant amount.

The record further demonstrates that, at trial, the District Court expressed significant doubts concerning Dr. Sprehe's testimony as to causation with respect to the standard enunciated in *Brown v. Cadillac Motor Division, supra* n. 4. The following occurred at a bench conference overheard by Bodine, where Bodine's Counsel correctly related what Dr. Sprehe's testimony would be:

> MR. P. MARTIN: He is going to say that he observed, in talking about this particular situation, which he believes is attributable to this, that he observed that the witness would break down into a sweat right in front of him, a cold sweat, right in front of him, would physically start to sweat and start to fidget, right in front of him.
>
> THE COURT: I would suggest to you that it would stretch credibility to expect a fact finder to relate — causally relate that to an incident which occurred three or four years ago.

This conference occurred during the cross-examination of Bodine by Counsel for Kemper. Following the conference, for the first time in the litigation and in "response" to a question concerning his direct testimony, when he stated he *left* Yordan's house while Yordan called Kemper, Bodine injected the November 7, 1983 "throwing up" episode which allegedly occurred at Yordan's house.

4/ A fact ignored by the Eleventh Circuit's opinion. *See, Brown v. Cadillac Motor Division, supra,* p. 2 n. 2. Assuming, *arguendo,* the applicability of the modification of the impact rule in *Champion v. Gray, supra* p. 2 n. 2, the Eleventh Circuit's failure to specifically identify the undisputed character of Bodine's "injuries," which clearly do not meet the Florida standard ("psychological trauma must cause. . .discernible physical injury, such as death, paralysis, muscle impairment, or similar objectively discernible physical impairment before a cause of action may exist," *Brown, supra,* at 604), is certainly not a result of the lack of such evidence in the record. It is a product of the Circuit Court's ignoring the impact rule applicable to one in Bodine's position and which bars recovery of damages for purely emotional distress by one put in fear of his own life.

As stated by the Supreme Court of Florida in *Champion v. Gray,* 478 So.2d at 22:

> In this case we have emphasized that a physically traumatized person must manifest a discernible physical injury before that person has a claim resulting from *injuries inflicted on another.* A separate and distinct physical injury is required. We have specifically rejected purely emotional distress claims. *Brown v. Cadillac Motor Car Division,* 468 So.2d 903 (Fla. 1985). (Emphasis added).

The *Brown* "physical impairment" standard, announced in *Champion* and defined in *Brown,* and the other standards enunciated in *Champion,* are applicable as a relaxation of the impact rule *only* in situations involving emotional damages occasioned by injury to a close family member or one having a close relationship with the Plaintiff. They substitute for the continued requirement of "impact" with respect to emotional distress of a plaintiff put in fear of his own life, as was Bodine, *Sguros v. Biscayne Recreational Development Company* and *Champion, supra* p. 2 n. 2, because, as stated by the Florida Supreme Court in *Champion,* 478 So.2d at 20:

> . . . in our view it is necessary to curb the potential for fraudulent claims, and to place some boundaries on the indefinable and immeasurable psychic claims.

In this case, Bodine can hardly complain about a remittitur when he was not entitled to *any damages* for any of his psychic injuries.

In essence, with respect to the remittitur, Bodine's Petition presents arguments and assertions in a factual vacuum which ignores the stated basis for the Eleventh Circuit's action. This is obviously in the hope that this Court will become a Court to be utilized by litigants as but another tribunal to review the facts. Courts of appeals are not mere way stops on the road to this Court. This Court does not act as a mere appellate tribunal to review questions of fact of interest only to the parties themselves. *See*

e.g., NLRB v. Hendricks City Rural Electric Membership Corp., 454 U.S. 170, 176 n. 8, 70 L.Ed 2d 323, 330 n. 8, 102 S.Ct. 216 (1981); *United States v. Johnston,* 268 U.S. 220, 227, 69 L.Ed 925, 926 45 S.Ct. 96 (1925):

> We do not grant a certiorari to review evidence and discuss specific facts.

CONCLUSION

For the foregoing reasons, Bodine's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR FEDERAL
KEMPER LIFE ASSURANCE
COMPANY,
Respondent

NO. 90-1114

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

EDMUND J. BODINE, JR.,

Petitioner,

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Respondent.

APPENDIX TO BRIEF IN OPPOSITION FOR RESPONDENT, FEDERAL KEMPER LIFE ASSURANCE COMPANY

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COMPANY, RESPONDENT

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APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EDMUND J. BODINE, JR.,

Plaintiff,

vs. **CASE NO. 85-1814-CIV-T-17**

FEDERAL KEMPER LIFE ASSURANCE CO., et al.,

Defendants.

ORDER ON MOTIONS

This cause is before the Court on Defendant Federal Kemper Life Assurance Company's (hereinafter Kemper) motion for summary judgment, Kemper's motion to strike portions of affidavit of Edmund Bodine, Plaintiff's motion for sanctions, and responses thereto.

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *Sweat v. The Miller Brewing Co.,* 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First National Bank of Mt. Pleasant,* 595 F.2d 994, 996-7 (5th Cir. 1979), quoting *Gross v. Southern Railroad Co.,* 414 F.2d 292 (5th Cir. 1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in *Celotex Corp. v. Catrett,* 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548, (1986),

> In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and

> on which that party will bear the burden of proof at trial. Id. at 273.

The Court also said, "Rule 56(e) therefore requires that nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue for trial.' " *Celotex Corp.,* at p. 274.

On August 20, 1986, Plaintiff filed an third amended complaint (hereinafter complaint). Count II of the complaint was directed at Defendant Kemper and states the following (paragraph numbers are cited as they appear in the complaint):

> 12. On or about July 18, 1982, a policy of insurance in the amount of Two Million Dollars ($2,000,000.00) was issued by Defendant, KEMKER, upon the life of EDMUND J. BODINE, JR., Policy Number FK1309281.
>
> 13. Defendant, KEMKER, was negligent and careless in their conduct regarding Policy Number FK1309281 in one or more of the following ways:
>
> A. In issuing a policy of life insurance with such a large face value without adequately and properly investigating the insured and the beneficiary thereto, nor the circumstances surrounding such application for insurance, thereby exposing the insured to foreseeable danger from the beneficiary to the said policy.
>
> B. In issuing a policy of life insurance wherein the only beneficiary was an entity which had no relationship nor insurable interest therein (i.e. Cayman Films, Ltd.) without adequately and properly investigating the circumstances behind such application for insurance.
>
> C. In failing to discover the existence of such conditions following the issuance of the insurance contract in a reasonable and timely fashion after negligently and carelessly permitting such conditions to exist.

D. In failing to cancel the aforementioned policy of insurance after they had received actual verbal and written notification of the beneficiary's murderous intent in derogation of the well-being of the insured.

E. In failing to properly and adequately investigate the facts concerning the welfare and well-being of the insured following their receipt of actual notice of the circumstances aforementioned; and

F. In failing to discover the aforementioned facts in a reasonable and timely fashion after issuing the said policy of insurance.

14. Despite receiving direct communication and actual and express notice of the murderous intent to the life of the insured under Policy Number FK1309281 by the policy beneficiary, Defendant, KEMPER, willfully, wantonly, maliciously, callously and with complete disregard for the rights and well-being of their insured, and despite an express duty to this policy insured, did refuse to withdraw and cancel said policy of insurance, thereby deliberately exposing EDMUND J. BODINE, JR., to continued violence and threats of death as aforesaid.

15. As a direct and proximate cause of the willfully malicious conduct of Defendant, KEMPER, EDMUND J. BODINE, JR., has suffered severe trauma, physical and emotional. He has been prevented from the completion of several business ventures and has incurred losses therein. Plaintiff has been further exposed to false and libelous accusations, has been prevented from leading a normal lifestyle and has been forced to secret himself and isolate himself from friends, relations, business associates and others with whom he might ordinarily associate with upon a daily basis.

WHEREFORE, the Plaintiff, EDMUND J. BODINE, JR., demands judgment for compensatory damages and punitive damages in the amount of ONE HUNDRED MILLION DOLLARS ($100,000,000.00) against Defendant, KEMKER, and further demands trial by

jury of all issues triable as of right by jury.

The first question the Court must address is what, if any, duty Defendant Kemper owed to Plaintiff in this instance to protect Plaintiff or to investigate prior to issuing the policy in question. The Court has found several limited instances where the law places a duty on an insurance company to protect its insured. "The only duty the law imposes on an insurance company to protect its insured is that the company take reasonable steps to determine whether the insured has consented to the policy or the change in beneficiary or should have known that the person procuring the policy did not have an insurable interest in the insured's life." *Bacon v. Federal Kemper Life Assurance Co.,* 512 N.E.2d 941 (Mass. 1987).

There are several instances where an insurance company has been found liable for harm to an insured, the facts of those cases limit the liability to a handful of circumstances. In *Life Insurance Company of Georgia v. Lopez,* 443 So.2d 947 (Fla. 1983), the insured claim he had not consented to the issuance of the policy (he claimed he had been tricked by his wife, that he called the insurance company and told them of the danger to his life and that they failed to investigate. The court answered, in the affirmative, the following certified question:

> Whether an insured issuing an insurance policy can be liable in tort to the insured where the policy beneficiary attempts to murder the insured in order to collect the policy benmefits and where the insurer had actual notice of the policy beneficiary's murderous intent. *Id.,* at 948.

The Court stated that insurance companies generally cannot be held to be "guarantors" of the good intentions of their customers, but, neither, can they be relieved of a duty to investigate when a beneficiary's criminal motive is made known to them. *Id.,* at 949.

A second relevant case is *Liberty National Life Insurance Co. v. Weldon,* 100 So.2d 696 (Ala. 1957). In *Weldon,* the father of the insured sued for wrongful death of the insured resulting from the alleged negligence of the insurers in issuing policies on the child's life to an aunt with no insurable interest, where the insurance agents were aware of the lack of insurable interest, and where the aunt subsequently murdered the child. The court found, in these circumstances, the question of negligence to be a jury issue.

In *Ramey v. Carolina Life Insurance Co.,* 135 S.E.2d 362 (S.C. 1964), the plaintiff alleged that the signatures on the application and inspection for life insurance forms were forgeries and were known by the defendant to be forgeries, but that the defendant issued the policy despite the knowledge that the plaintiff did not consent to the policy. The court, adopting the order of the circuit judge, found a clear distinction between cases where the "policy is procured by the insured bona fide on his own motion and cases in which it is procured by another. It is a very different thing for a man to create voluntarily an interest in his termination and to allow some one else to do so at their will." *Id.,* at 364-65.

The three situations which courts have held create a cause of action against the insurer for the issuance of a policy of life insurance, which results in danger to the life of the insured, may be summarized as follows:

> 1. Where the insurer has actual knowledge of threats on the life of the insured, the insurer fails to investigate the allegations of danger to the insured, and fails to rescind the policy, a *Lopez* situation;
>
> 2. Where there is no insurable interest in the named insured by the beneficiary and the insurer knew, or should have known, of the lack of insurable interest, a *Weldon* situation; and
>
> 3. Where the insurer knew, or should have known, of the forgery of the insured's signature on the policy application.

The Court first addresses the allegations of the complaint pertaining to the issuance of the life insurance policy on Plaintiff in or about July 18, 1982. (Paragraph 13, subparagraphs A, B, C, and F of Count II of the third amended complaint. The Court, upon due consideration, finds that the facts as alleged herein do not meet the criteria for finding liability against Defendant for the issuance of the life insurance policy.

In this case, Plaintiff meet with Kemper agent Robert Hiatt in Salt Lake City, Utah for the purposes of obtaining key man insurance for himself and three others. Plaintiff signed the application for insurance and subsequently submitted himself for the required physical examination in pursuit of the policy. There are no allegations in this case of forgery, that the insurer had any

reason to be aware that the beneficiary of the policy might not have an insurable interest, or that at the time of the issuance of the policy the insurer knew or should have known of any threats to the life of Plaintiff or any other insured.

The Court finds that there is no issue of material fact as to whether Defendant Kemper breached any duty to Plaintiff as to the issuance of the insurance policy. The Court finds that the motion for summary judgment should be **granted** as to Paragraph 13, sub-paragraphs A, B, C, and, F of Count II of the third amended complaint.

It is not entirely clear from the memorandum in support of the motion for summary judgment whether or not Defendant Kemper seek summary judgment as to Paragraph 13, sub-paragraphs D and E of Count II, relating to the alleged negligent failure to cancel the policy following notification of the death threats. Assuming Defendant seeks summary judgment of all issues, the Court has reviewed that issue as to whether or not summary judgment is appropriate.

At some point in time, approximately November of 1983, Defendant Kemper was notified by Plaintiff and another insured, Phillip Yordan, that there were death threats against their lives. The two men requested that the life insurance policies be cancelled. Defendant Kemper alleges that they reasonably undertook to investigate the allegations presented to them regarding death threats and when they had sufficient evidence of the existence of the threats they cancelled the policies, without having the permission of the owner of the policy. As stated previously, when an insurer has notice of threats against an insured's life it has a duty to investigate and to cancel the policy if appropriate. *Lopez*, 448 So.2d 947.

The Court finds that the issue regarding the claim of negligence in not cancelling the policy after notification of the death threats does present a genuine issue of material fact. The question for the jury will be whether or not the investigation, the time it took to conduct and the handling of it, satisfied Defendant's duty pursuant to case law. The Court cannot find as a matter of law, based on the record presented herein, that the duty was met and that there is no genuine issue of negligence. The motion for summary judgment as to this issue should be **denied.**

Paragraph 13, subparagraphs D and E, and Paragraph 14, Count II of the third amended complaint, asserts that the failure of Defendant Kemper to immediately cancel the life policies was willful, wanton, malicious, etc., thus entitling it to punitive damages.

The parties agree that the standard for awarding punitive damages is "an intentional wrong that amount[s] to an independent tort, . . . the entire want of care or attention to duty that would allow a jury to impute malice . . ." *Nicklaus v. Miami Burglar Alarm Co., Inc.,* 339 So.2d 175, 177-78 (Fla. 1976; *American International Land Corp. v. Hanna,* 323 So.2d 567 (Fla. 1975).

The Court, having reviewed the record and upon due consideration, finds that Plaintiff has failed to establish a genuine issue of fact as to the issue of entitlement to punitive damages. There is nothing in the record to support the punitive damage claim. The record shows that Defendant Kemper undertook to investigate the allegations of death threats upon receipt of notice from Plaintiff. The Court adopts Defendant Kemper's recitation of these facts which appear at pages 18 through 21 of its memorandum in support of the motion for summary judgment.

Plaintiff has failed to come forward with any evidence in support of the opposition to the motion for summary judgment which support any finding of willful, malicious, wanton disregard of their duty against Defendant Kemper. The motion for summary judgment as to the claim for punitive damages should be **granted.**

The State of Florida recognizes the tort of intentional infliction of emotional distress. The threshold test in assessing a claim for this tort is whether

> . . . such behavior is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." In applying the standard, it is manifest that the subjective response of the person who is the target of the actor's conduct is not to control the question of whether the tort occurred. Rather, an evaluation of the claimed misconduct must be undertaken to determine, as objectively as is possible, whether it is "atrocious, and utterly intolerable in a civilized community." (cite omitted) That burden falls to the judiciary—it is a matter of law, not a question

> of fact. (cite omitted) The deportment described in the pleaded facts with which we are concerned, condemnable by civilized social standards, does not ascend, or perhaps descend, to a level permitting us to say that the benchmarks enunciated in *Metropolitan* have been met.

Ponton v. Scarfone, 468 So.2d 1009, 1011 (Fla. 2d D.C.A. 1985); *Metropolitan Life Ins. Co. v. McCarson,* 467 So.2d 277 (Fla. 1985).

The Court has assessed the allegations made against Defendant Kemper to determine as a matter of law whether the allegations, as supplemented by the affidavits and depositions, support Plaintiff's claim of intentional infliction of emotional distress. Upon due consideration, the Court is satisfied that the allegations and supplemental evidence cannot sustain the claim. The alletations fall far short of behavior which is "beyond all possible bounds of decency." The motion for summary judgment should be **granted** as to the claims for intentional infliction of emotional distress.

The final issue of the motion for summary judgment is whether the is a genuine issue of material fact as to any claim for negligent infliction of emotional damages. Florida recognizes this cause of action where a person suffers a significant discernible physical injury resulting from psychic trauma caused by negligence. *In re Eastern Airlines, Inc., Engine Failure,* 629 F.Supp. 307 (S.D. Fla. 1986); *Champion v Gray,* 478 So.2d 17 (Fla. 1985).

Plaintiff has the burden of establishing the existence of physical injury in order to be entitled to damages for negligent infliction of emotional damages, and, therefore, must by affidavits, depositions, etc. establish a genuine issue of material fact exists of that claim. *Celotex Corp.,* 477 U.S. at 274. All we have in this cause is Plaintiff's statement that he has suffered "physical trauma" (Paragraph 15, third amended complaint) and "physical distress" (answer to interrogatories attached to Defendant's memorandum in support of motion for summary judgment). Plaintiff has failed to go beyond the conclusory allegations of the complaint to establish there exists a genuine issue of material fact on this claim. Accordingly, it is

ORDERED that the motion for summary judgment be **granted** and the following claims of the third amended complaint be **dismissed:** Paragraph 13, subparagraphs A, B, C, and F, of

Count II, the claim for punitive damages, the claim for intentional infliction of emotional distress, and the claim for negligent infliction of emotional distress. There remains pending in this cause the issue of negligent failure to cancel the insurance policy, following notification of the existence of death threats, for approximately one month.

DONE and ORDERED in Chambers, in Tampa, Florida this 23rd day of January, 1989.

/s/ Elizabeth A. Kovachevich

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EDMUND J. BODINE, JR.,

Plaintiff,

v. **CASE NO: 85-1814-Civ-T-17**

FEDERAL KEMPER LIFE ASSURANCE COMPANY, et al.

Defendants,

M E M O R A N D U M

This is a state cause of action in diversity pursuant to the recently recognized tort of negligent failure of an insurance company to cancel a life insurance policy following notice of a plot to kill the insured. Before me now is defendant's Motion in Limine to Exclude Evidence of Plaintiff's Damages. For the rational which follows I will deny defendant's motion.

Background.

The facts for the purpose of the motion before me now are relatively simple. Plaintiff, Edmund Bodine, was a partner in a motion picture production venture. In July, 1982, Key Men Life Insurance policies were obtained in the amount of approximately $2,000,000.00 for each partner in the venture.

United States government agents informed Bodine in October, 1983, that a person or persons had been hired to kill him. Bodine, after some investigation of his own, determined that the plot to kill him was an effort by one of his business partners to collect on the Key Man Insurance policy benefits. Bodine naturally enough called defendant, Federal Kemper Life Assurance Company, to demand that the policy be immediately cancelled.

Plaintiff alleges that for reasons due to the negligence of defendant, the policy was not cancelled until approximately 30 days later. Plaintiff asserts damage for physical, financial, and

psychological injuries suffered as a result of the emotional distress he experienced during this 30 day waiting period. It is the issue of plaintiff's legal right to collect these damages which is the focus of defendant's motion.

Discussion.

As a federal court sitting in diversity I must apply the law of the forum state. *Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1938). However, when the state courts have not spoken as to a particular issue, the federal court must predict how the state's Supreme court would rule when faced with that issue. *Commissioner v. Estate of Bosch,* 387 U.S. 456, 457 (1967); *Delduca v. United States Fidelity & Guaranty Company,* 357 F.2d 204 (5th Cir. 1966). While a federal court is not free to follow its own inclinations in such matters, I must be sensitive to the doctrinal trends of the state of Florida whose law I am to apply in this case. *See Morton v. Abbatt Laboratories,* 538 F.Supp. 593 (M.D. Fla. 1982) (If no state precedent, federal court sitting in diversity should look for indicators as to how state Supreme Court would rule); *See also Becker vs. Interstate Properties,* 569 F.2d 1203, 1206 (3d Cir. 1977), cert. den. Interstate Properties v. Becker, 431 U.S. 906 (1978).

Previously, this Court granted summary judgment in favor of defendant on all counts alleged except for the cause for "negligent failure to cancel the insurance policy, following notification of the evidence of death threats. . ." *Bodine v. Federal Kemper Life Assurance Company,* No. 85-1814-CIV-T-17, slip. op. at 11 (M.D. Fla., Jan. 23, 1989)[1] Defendant's motion before me now asks this Court to effectively deny Plaintiff the right to recover damages on this claim.

The tort of the negligent failure of an insurance company to cancel a life insurance policy when it is aware of a death threat against the insured has only recently been recognized by Florida Courts. *See Lopez v. Life Insurance Company of America,* 406 So.2d 1155 (Fla. 4th DCA, 1981), *affirmed* 433 So.2d 947 (Fla. 1983).

---

1. Summary Judgment was entered prior to the time this case was reassigned to my docket for trial. In addressing this Motion in Limine I need not apply the summary judgment standards. For the purposes of this motion I am limited solely to the technical issue of damages pursuant to this cause of action.

The Court in *Lopez* sidestepped the question of any limitation on damages resulting from a purely psychological injury as a result of the new tort. The Court stated,

> [A]ppellee relies on *Claycomb v. Eichles*... for the proposition that damages may not be recovered for mental anguish or physical injury resulting from emotional stress which is caused by negligence where there is no physical impact. We neither subscribe to nor repudiate that proposition here.

Lopez, 406 So.2d at 1160. The Court went on to state the issue was moot because there was physical impact in *Lopez*. Defendant, in the instant case, argues that the lack of physical impact precludes evidence of substantially all of plaintiff's claimed damages. I disagree.

Defendant's argument is founded in the general rule applied by Florida Courts regarding emotional stress in negligence case. The Court in *Claycomb v. Eichles*, 399 So.2d 1050 (Fla. 2dDCA, 1981), stated this rule:

> The rule in Florida is that damages may not be recovered for mental anguish or physical injury resulting from emotional stress caused by the negligence of another, in the absence of a physical impact upon the plaintiff.

Id. at 1051.

The Florida Supreme Court has expressed the rule similarly. The "circumstances under which one may recover for emotional or mental injuries, is when there has been a physical impact or when they are produced as a result" of an intentional tort to cause emotional distress. *Gilliam v. Stewart*, 291 So.2d 593, 595 (Fla. 1974). *See also Steiner and Munach, P.A. vs. Williams*, 334 So.2d 39 (3d DCA, Fla. 1976), *cert. den.* 345 So.2d 429 (Fla. 1977).

In 1985, the Florida Supreme Court modified the "impact rule" for cases of negligent infliction of emotional harm where the plaintiff witnesses an injury to another and suffers some emotional harm. The Supreme Court held:

> that a claim exists for damages flowing from a significant discernable physical injury when such injury

> is caused by psychic trauma resulting from negligent injury imposed to another who, because of his relationship to the injured party and his involvement in the event causing the injury is foreseeably injured.

Champion v. Gray, 478 So.2d 17, 20 (Fla. 1985). *See also Ledford v. Delta Airlines, Inc.,* 658 F. Supp. 540 (S.D. Fla. 1987).

Although this modified "impact rule" does not apply to the cause of action before me now, it does indicate that the Florida Supreme Court has found equitable reason to depart from the rule under certain circumstances. Therefore, in order to predict how the Florida Supreme Court would apply the "impact rule" for the tort of the negligent failure to cancel a life insurance policy, I must examine the policies expressed by the Florida courts as to the "impact rule."

The Florida Supreme Court in *Champion* stated the policy behind the impact rule:

> The impact doctrine gives practical recognition to the thought that not every injury which one person may, by his negligence, inflict upon another should be compensated in money damages. There must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.

Champion, 478 So.2d at 18, *citing Gilliam, supra,* 271 So.2d at 477. In other words, the "impact rule" is to provide a "threshold indicator" of significant injury so the courts may feel satisfied that an emotional distress-based injury has actually occurred.

The *Champion* Court determined that this "threshold indicator" is not necessary when a "discernable physical injury (is) caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, is too great a harm to require direct physical contact . . ." *Id.* at 18. The Court did note, however, that there is still the requirement that the plaintiff suffer a "causally connected clearly discernable physical impairment (which) must accompany or occur within a short time of the psychic injury." *Id.*

The Supreme Court was aware that it had created a new tort

in its affirmance of the lower court *Lopez* decision. *Lopez,* 443 So.2d at 949. It is a negligence case of action unlike all others. The insurance company, in the proper circumstances is held to have a duty to act to deter the death threat:

> Such...circumstances must surely impose on the insurance company a duty to eliminate any motive for effecting the insured's death if not by withdrawing the coverage...then at least by warning the beneficiary that no proceeds would be payable if she in fact murdered the insured. Knowledge that the insurance company was aware of the plot and would scrutinize the insured's "accidental" death would *surely serve as a deterrent* to the accomplishment of the evil purpose.

Id. [emphasis added].

Logically, the "impact" which is likely is not caused by the tortfeasor under the new *Lopez* tort. The only impact which is possible is, as in *Lopez,* where the death threat is actually carried out or is in the process of being carried out. The impact is not created by the actions of the defendant insurance company, but rather flows indirectly from the failure to cancel the policy thus leaving reason for the murder, the insurance benefits, as a viable option for the murderers to pursue. The possible impact is one over which defendant has little direct control; it is, rather, an event almost entirely in the hands of a third party, save for defendant's duty to act to deter the event.

I conclude that the Florida Supreme Court would not find that the "impact rule" would create any principled "threshold" of injury that would separate meritorious claims from those which are not meritorious. The doctrinal trend in Florida, as evidence by the Supreme Court's decision in *Champion,* is to a relaxation of the "impact rule" in situations where the rule creates an arbitrary bar to those who should be compensated for emotional distress-related injury. It is clear from *Lopez* that the Florida Supreme Court believes that those injured by the negligence of the insurance companies in cases such as this one should be compensated. As in the scenario in *Champion,* the Court believes that the harm is "too great to require direct physical contact." There may be no emotional distress greater than the fear that one's life is constantly in danger from an unknown assailant. Therefore I conclude that the application of the "impact rule" would create the type of unprincipled threhold which the Supreme Court sought

to avoid in *Champion,* and would nearly eradicate the recovery under the cause of action it purposefully created.

I would emphasize that plaintiff still has the burden at trial to prove that his injuries were causally connected to defendant's action and that a clearly discernable physical injury or manifestation occurred within a short time of the psychological injury. *See Champion,* at 19. Physical impact is different from a physical manifestation of the distress-induced injury. The *Champion* court clearly indicated that a claim for emotional distress must be accompanied by a physical manifestation of the emotional injry absent impact. *Id. See also Eagle-Pitcher Industries, Inc. v. Cox,* 481 So.2d 517 (3d DCA), *review denied* 492 So.2d 1331 (Fla. 1985). The physical manifestation requirement is a much more principled manner in which to discern the severity of the mental distress of a plaintiff.

The Court is not unaware that plaintiff may have an uphill battle in proving that certain items of his damages were proximately caused by defendant's actions. There may also be a legitimate issue as to the foreseeability of some of plaintiff's alleged injuries. However, at this stage of the case, given the legal implications of this decision, these issues are more properly questions of fact for the jury or the subject of mid-trial motion for directed verdict.

I will deny the defendant's Motion in Limine in an appropriate Order which follows.

/s/ Clarence C. Newcomer, Jr.

Clarence C. Newcomer, J.

APPENDIX C

SUMMARY OF ARGUMENT

* * *

III. The jury award for pain and suffering and economic loss in this case was reasonable and consistent with the testimony and evidence. The Court may not substitute its opinion for that of the trier of fact absent a showing of a clear abuse of the jury's discretion. *Westbrook v. General Tire and Rubber Company,* 754 F.2d 1233, 1241 (5th Cir. 1985).

STANDARDS AND SCOPE OF REVIEW

* * *

Remittitur is appropriate only if the jury verdict is so large as to be contrary to right reason and there is a clear showing of abuse or passion or prejudice, but only where the verdict is so excessive as to shock the conscience of the Court. *Westbrook, supra,* at p. 1241; *Goldstein v. Manhattan Industries,* 758 F.2d 1447 (11th Cir. 1985), *cert. denied,* 474 U.S. 1005 (1985); *Hendrick v. Hercules, Inc.,* 658 F.2d 1088, 1095 (5th Cir. 1981).

ARGUMENT

* * *

III.

REMITTITUR IS IMPROPER UNLESS THE JURY AWARD EXCEEDS THE AMOUNT ESTABLISHED BY THE EVIDENCE.

Aside from Federal Kemper's meritless argument regarding a lack of a standard of care, it is clear that the jury fully and finally determined that Federal Kemper was liable for its actions in failing to cancel the policy of life insurance.

If this Court is satisfied that the verdict established the liability of Federal Kemper, then remittitur is only available if it is clear that the jury verdict was affected by improper considerations or was not supported by the evidence. *Goldstein v. Manhattan Industries,* 758 F.2d 1435 (11th Cir. 1985), *cert. denied,*

474 U.S. 1005 (1985); *Evers v. Equifax, Inc.,* 650 F.2d 793 (5th Cir. 1981). *Westbrook v. General Tire & Rubber Company,* 754 F.2d 1233 (5th Cir. 1985). The trial judge who refused to grant a new trial herein who, with the benefit of his participation at trial, his observation of the witnesses, and his understanding of the case, has found these elements present; it is not the province of the appellate court to second-guess his determination. See: *Edwards, supra* p. 281; *Hedrick,* p. 1095.

The testimony and evidence adduced at trial provide a sufficient basis for the jury award in this case. See *Goldstein, supra* p. 1448.

Federal Kemper's argument, moreover, with respect to a limitation of damages for pain and suffering to $750,000.00 is without merit. Fed. R. Civ. P. 16 (e) should be construed liberally. *Eagle v. American Tel. & Tel. Co.,* 679 F.2d 541 (9th Cir. 1985), *cert. denied,* 475 U.S. 1084, 106 S.Ct. 1465, 89 L. Ed. 2d 721 (1986).

Damages for pain and suffering are intangible and are purely discretionary with the trier of fact and cannot be limited unless a clear abuse of discretion is shown. Moreover, no new theory of relief not pled by Bodine was revealed at trial with respect to 841 F.2d 918 (9th Cir. 1988). Rather, a higher award by the jury is "implicitly included" in the Pretrial Order. See: *Eagle, supra* p. 548.

Supreme Court, U.S.
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No. 90-1114

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

EDMUND J. BODINE, JR.,

Petitioner,

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I.

WHETHER THIS COURT SHOULD INVOKE ITS DISCRETIONARY JURISDICTION WHERE THE SEVENTH AMENDMENT ISSUE SOUGHT TO BE REVIEWED IN THE PETITION IS EXCEPTIONAL AND REOCCURRING IN NATURE?

II.

WHETHER THE ELEVENTH CIRCUIT EXCEEDED ITS APPELLATE POWERS IN REVIEWING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR REMITTITUR WHERE SUCH REVIEW IS CONSTITUTIONALLY PRECLUDED BY THE SEVENTH AMENDMENT?

III.

REGARDLESS OF THE SEVENTH AMENDMENT ARGUMENT, WHETHER THIS COURT SHOULD INVOKE ITS DISCRETIONARY JURISDICTION WHERE THE COURT OF APPEALS ARBITRARILY REDUCED THE PLAINTIFF'S PAIN AND SUFFERING DAMAGES FROM $2,000,000.00 TO $1,000,000.00 WITHOUT EXPLANATION IN VIOLATION OF *GRUENTHAL V. LONG ISLAND R. CO.*, 393 U.S. 156 (1968)?

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EDMUND J. BODINE, JR.,
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FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

Petitioner, Edmund J. Bodine, Jr., respectfully submits his Reply Brief to the Respondent's Brief in Opposition to the Petition for Writ of Certiorari filed by the Petitioner.

STATEMENT OF THE CASE

Petitioner relies on his statement of the case filed in his Petition with the following additions in response to the Respondent's brief:

1. Although nearly three and one-half years expired from the filing of the lawsuit in December of 1985 until the trial in March of 1989, the Respondent never requested an independent medical examination of Mr. Bodine regarding his emotional trauma

although he had been seen by Dr. Sprehe, with the Respondent's knowledge, since January of 1987.

2. Regarding Respondent's statements concerning the fact that Mr. Bodine did not see Dr. Sprehe until January of 1987, Dr. Sprehe testified at the trial that such a situation was not unusual. Dr. Sprehe stated:

> It is not unusual at all for people who have traumatized and had that trauma cause them a psychological problem, for them to lack the insight to realize themselves that they could use psychiatric treatment. For that matter, it is not unusual for many people walking the street out there who very much need psychiatric treatment to not be willing to admit it themselves. So it just took Mr. Bodine this long a time to realize that he has got to get some professional help for his emotional problem.

3. Regarding Respondent's argument that Kemper is not fully responsible for Mr. Bodine's damages, Dr. Sprehe stated that the failure to cancel the insurance policy:

> (G)reatly expanded (Mr. Bodine's) notion of the massiveness of the plot against him, in that he thought at the time, in his mind, that there was involvement of high officials within this insurance company that would keep the motivation for him being killed alive.... He was very frightened already...but then this really terrified him, and he thought that this was a much broader plot because of their refusal to cancel the insurance policy.

4. Finally, the Respondent has resorted to surmising that Mr. Bodine "overheard a bench conference" as the basis for him testifying regarding his physical impairment. Respondent's Brief in Opposition at 4. Obviously, there is no evidence of Mr. Bodine overhearing anything and using such speculation as a basis for a remittitur is non-meritorious.

REASONS WHY THE PETITION SHOULD BE GRANTED

I.

THE SEVENTH AMENDMENT ISSUE SOUGHT TO BE REVIEWED IN THE PETITION IS EXCEPTIONAL AND REOCCURRING IN NATURE AND SHOULD BE CONSIDERED ESPECIALLY SINCE THIS COURT HAS GRANTED CERTIORARI PREVIOUSLY.

As this Court stated in *Duignan v. United States,* 274 U.S. 195, 200 (1926):

> It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.

However, the Supreme Court has exercised that exceptional power several times to consider important issues. *Youakim v. Miller,* 425 U.S. 231, 234 (1976) (possible conflict between the Illinois foster care program and the Social Security Act was considered based on the Supremacy Clause which had not been raised in the District Court or in the Appellate Court); *Carlson v. Green,* 446 U.S. 14 (1980) (issue raised for the first time in petition for writ of certiorari as to whether a cause of action may have arose under the Federal Tort Claim Act where the decedent failed to receive proper medical treatment in federal prison; *Boynton v. Commonwealth of Virginia,* 364 U.S. 454 (1960) (issue considered as to impact of the Interstate Commerce Act where the petition for writ of certiorari presented issues regarding due process).

In *Boynton,* the Court stated:

> We think. . . that the claims of discrimination previously made under the Act are sufficiently closely related to the assignments that were made to be considered within the scope of the issues presented. . .

Boynton, supra, at 457.

Likewise, in *Carlson*, the Court stated regarding the F.T.C.A. claim:

> This question was presented in the petition for certiorari, but not in either the District Court or the Court of Appeals . . . It is an important, reoccurring issue . . . We conclude that the interest of judicial administration will be served by addressing the issue on its merits.

Carlson, supra, at 17 n.2.

In the present case, it is obvious that the alleged violation of the Seventh Amendment by allowing the Court of Appeals to remit damages and, thereby override the trial court and jury's decision, is an "important, recurring issue" especially since this Court has already granted certiorari on three prior occassions on this issue. *See, Browning-Ferris Industries v. Kelco Disposable, Inc.*, 492 U.S. ____, 109 S.Ct. 2909, 2922 n.25 (1989); *Neese v. Southern R.Co.*, 350 U.S. 77 (1955); *Grunenthal v. Long Island R. Co.*, 393 U.S. 156 (1968).

Likewise, the Seventh Amendment argument is "closely related" to the abuse of discretion argument which the respondent acknowledges has been properly preserved for this appeal. In fact, all three Supreme Court cases cited above avoided the Seventh Amendment question by determing that the trial court did not abuse his discretion in denying the granting of a new trial or remittitur in each case. *Browning-Ferris Industries, supra,* at 2922 n.25.

II.

THE ELEVENTH CIRCUIT EXCEEDED ITS APPELLATE POWERS IN REVIEWING THE TRIAL COURT'S DENIAL OF THE DEFENDANT'S MOTION FOR REMITTITUR BECAUSE SUCH REVIEW IS CONSTITUTIONALLY PRECLUDED BY THE SEVENTH AMENDMENT.

The Petitioner relies on his argument I in his Petition in response to Respondent's argument II.

III.

REGARDLESS OF THE SEVENTH AMENDMENT ARGUMENT, THE COURT OF APPEALS ARBITRARILY REDUCED THE PLAINTIFF'S PAIN AND SUFFERING DAMAGES FROM $2,000,000.00 TO $1,000,000.00 WITHOUT EXPLANATION IN VIOLATION OF *GRUNENTHAL V. LONG ISLAND R. CO.*, 393 U.S. 156 (1968).

In Respondent Kemper's opposition brief, the Respondent attempts to justify the Eleventh Circuit's remittitur by using its own arguments as a substitution for substantive evidence. The Eleventh Circuit stated:

> *Kemper argues* that the verdict in the amount of $2,000,000.00 for pain and suffering was so excessive as to require a remittitur. *Kemper argues* that ... Bodine was aware that the policy had been cancelled by February 28, 1984. *Kemper also argues* that much of Bodine's anxiety was necessarily caused by the murder plot itself, rather than by Kemper's alleged negligence in failing to cancel the policy. (A. 9). (Emphasis added).

What the Respondent has failed to mention is that its arguments were not substantiated by evidence. Specifically, as the Petitioner has already noted in his Petition, the only evidence regarding Mr. Bodine's pain and suffering was presented by the Plaintiff himself and by Dr. Daniel Sprehe. While Kemper "argued" they were not responsible for all of Mr. Bodine's anxiety, it presented no evidence to delineate the damages caused by the murder plot itself from the damages caused by Kemper's failure to cancel the policy. Consequently, it was reasonable for the jury to determine, and for the trial court to agree, that Kemper was responsible for Mr. Bodine's pain and suffering damages.

In *Grunenthal v. U.S.*, the Supreme Court found that the Second Circuit's relevant discussion of remittitur was insufficient

to overturn the trial judge's denying of the remittitur. However, the Second Circuit discussed and considered much more evidence regarding pain and suffering damages than the Eleventh Circuit did in this case. Specifically, the Second Circuit stated:

> Grunenthal was a track worker assigned as acting foreman to the task of directing the removal of the timber tie. He was 45 at the time of the trial, with a life expectancy of 27 years. He had worked as a laborer or trackman for the Railroad during his entire mature life and was receiving, including overtime from $5,600 to $6,000 a year.
>
> His right foot was crushed by the impact of the heavy timber tie. The compound fracture involved the instep, the great toe joint and the second metatarsal. He was hospitalized on five separate occasions covering a total of 78 days between September 1962 and June 1964. There were several operations, including one of skin grafting and another "right sympathectomy." At one time there was danger that gangrene would develop. During all this period Grunenthal suffered much pain and a dull pain continued up to the time of the trial. While Grunenthal is able to walk his movement is greatly impaired as he is unable to place any weight on the inner portion of his right foot. He is not totally disabled and the testimony of his expert witness indicates he can engage in "sedentary type work." Grunenthal said his efforts for permanent employment up to the time of the trial had been unavailing and he was then engaged in part time work as a custodian.

Grunenthal v. Long Island Railroad Co., 388 F. 2d 480, 484 (2d Cir. 1968), *reversed,* 393 U.S. 156 (1968).

It is clear in the present case that the Eleventh Circuit cited practically no factual basis upon which to grant a remittitur, certainly substantially less evidence than the Supreme Court found insufficient in *Grunenthal.* In fact, the only discussion as to why the damages were excessive was references to Kemper's arguments that the award was too high and that Kemper should not be responsible for the full amount. Simply citing arguments without

substantial evidence certainly does not fulfill the abuse of discretion standard which is required by a court of appeals to overturn the trial court's denial of a motion for remittitur.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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